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October 8, 2008

VIA ECFS

Chairman Kevin J. Martin
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *High-Cost Universal Service Support; Federal-State Joint Board on
Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45

Dear Chairman Martin:

NuVox, by its attorneys, urges the Federal Communications Commission ("Commission") to ensure that the record on potential alternatives to the current universal service contribution mechanism is complete before adopting any radical reform measures. Fundamental questions regarding contribution reform have not been answered. The Commission will not be able to answer these questions until it publishes a detailed and specific contribution reform proposal so that the public can provide meaningful feedback regarding whether the proposal would be practically feasible, susceptible to arbitrage, overly burdensome, unfair to certain types of customers, or within the authority of the Commission to adopt. In order to help streamline this process, NuVox writes to explain why the Commission should reject hybrid methodologies and why the agency lacks the authority to impose a pure numbers-based mechanism.

The Record on Reform of the Contribution Mechanism Is Incomplete

The Commission has requested comment generally upon whether the current revenues-based contribution mechanism should be replaced with a pure numbers-based mechanism, a connections-based mechanism, or a hybrid mechanism that combines elements of both the numbers- and connections-based methodologies. However, the Commission has not requested comment on a specific proposal to reform the contribution mechanism. Unless the specific details of a reform proposal are publicly available, the feedback available to the Commission

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regarding that proposal will be largely useless because the “devil is in the details,” particularly when it comes to universal service reform.

Various parties have expressed general support for a numbers-based contribution mechanism despite the lack of specificity about how such a mechanism would function.¹ Indeed, until Verizon and AT&T’s ex parte filing of September 11, 2008, no party had even attempted to describe in any detail how a numbers-based contribution mechanism would work. However, the Verizon/AT&T Joint Proposal, which is more accurately described as an outline of what such a plan might look like, lacks the type of detail necessary for parties to provide meaningful feedback.

The consequences of imposing a radically different contribution mechanism without first receiving comment regarding the specific rules adopted to implement the mechanism could be grave.² Specifically, without the benefit of the experience and knowledge of the carriers that will have to implement and comply with the new mechanism, the Commission might adopt rules which have unintended consequences that undermine the entire universal service system. For example, without public feedback, the Commission cannot accurately predict the susceptibility of specific proposed rules to arbitrage. Arbitrage can undermine stability, which is a crucial element of any contribution mechanism because the amount each contributor must pay is directly impacted by the ease with which other parties can evade the contribution obligation altogether.³

The Commission similarly cannot predict the costs and burdens of implementing specific rules without feedback from the parties who will have to implement those rules by modifying their billing, reporting, and administrative systems. For example, numerous parties who support

¹ AT&T and Verizon Joint Proposal, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 0-337, CC Docket No. 96-45 (filed Sep. 11, 2008) (proposing a numbers based contribution mechanism); Ex Parte Letter of Global Crossing, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Sep. 18, 2008) (generally supporting the Verizon universal service and intercarrier compensation proposals).

² The full notice and comment requirement is the keystone of the Administrative Procedures Act. 5 U.S.C. § 500 *et seq.*

³ To the extent business customers and other high-volume number users can reduce, or even in some cases eliminate, their number usage, low-usage residential subscribers would have to pay more under a numbers-based contribution mechanism. *See also* Ex Parte Comments of Ionary Consulting, *Universal Service Contribution Methodology; Federal State Joint Board on Universal Service* (filed Sep. 19, 2008) (“[A numbers-based] fee is also regressive, as it increase the USF assessment on the lowest-usage residential subscribers. A home phone user who makes few interstate calls (such as a low-income or elderly person) ...will pay the same fixed per-number fee as a business line that is intensively utilized.”).

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a numbers-based contribution mechanism support various exemptions from the contribution requirement, and yet the Commission cannot ascertain the burdens imposed by tracking and implementing such exemptions without receiving comment on those specific exemptions.⁴ As such, the Commission cannot accurately determine whether the potential benefits of proposed reform will outweigh the burdens carriers and end users will bear to implement and comply with the reforms. Indeed, increasing the burden of complying with the universal service contribution mechanism will increase service prices, which is directly contrary to the statutory goals for the universal service program. To reduce the likelihood of these types of harms, the Commission should provide parties with the opportunity to comment on specific and detailed reform proposals, including the rules that would implement those proposals.

The Commission Should Reject Hybrid Contribution Mechanism Proposals

NuVox urges the Commission to reject all numbers/connections and numbers/revenues hybrid mechanism proposals. The imposition of a hybrid mechanism likely would cause service providers to suffer the detriments associated with both systems without providing any offsetting benefit. Specifically, service providers would have to implement all of the changes necessary to implement both methodologies, which share no common elements that could facilitate efficiencies.

The individual components of the hybrid methodologies are also fundamentally inconsistent with each other, which means that a hybrid contribution mechanism would introduce additional complexity and ambiguity into the universal service program.⁵ Complexity and

⁴ The Commission must also seek comment on what groups, if any, deserve exemption from the USF contribution requirement, which may vary depending upon the details of the contribution requirement being considered. Ex Parte Letter of NASUCA, *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195; *Lifeline and Link-Up*, WC Docket No. 03-109; *Rural Health Care Support Mechanism*, WC Docket No. 02-60; *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6; *Intercarrier Compensation Reform*, CC Docket No. 01-92; *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256; *Intercarrier Compensation for IP-Bound Traffic*, CC Docket No. 99-68; *Access Charge Reform*, CC Docket No. 96-262; *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286 (filed Sep. 30, 2008) (*NASUCA Letter*).

⁵ For example, many carriers purchase telecommunications services (which are not associated with telephone numbers) from third-party carriers for use in providing various types of telecommunications and information services (some of which are associated with

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ambiguity increase the burdens of compliance, create additional opportunities for arbitrage, and make compliance audits much more difficult, which ultimately would make the contribution mechanism less stable and predictable. Instability harms end users, particularly residential end users who are less likely to be able to take steps to reduce their universal service contribution obligation and who face greater harm from unexpected increases in contribution levels.

None of the Pending Numbers-Based Proposals Reflect the Limits on the FCC's Authority

Section 152(b) of the Act denies the Commission “jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communications service.”⁶ As the Fifth Circuit has noted, to overcome this “statutory presumption” that the Commission lacks authority over intrastate issues, the Commission must point to “unambiguous language showing that the statute [at issue] applies to intrastate matters.”⁷ The universal service provisions of the Act do not contain unambiguous language showing that they apply to intrastate matters.⁸ To the contrary, the universal service provisions of the Act make clear that the Commission’s authority is limited to interstate matters.⁹ The same is true with respect to the numbering provisions of the Act.¹⁰ Section 251(e)(1) grants the Commission “exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States” and section 251(e)(2) requires that the “cost of establishing telecommunications numbering administration arrangements and number portability [] be borne by all telecommunications carriers on a competitively neutral basis,” but nothing in section 251 suggests that the Commission has authority over intrastate matters beyond the administration of numbers associated with intrastate services, including the authority to recover the costs of such administration.

telephone numbers and some of which are not) to their end users. Moreover, many carriers offer bundled offerings of services that use telephone numbers with services that do not use telephone numbers. Under these circumstances, the attribution rules would be unnecessarily complex since the manner for calculating contributions would be greatly different for services that use telephone numbers and services that do not.

⁶ 47 U.S.C. § 152(b) (emphasis added).

⁷ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447-48 (5th Cir. 1999) (citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 380-81 (1999)) (*TOPUC*). The courts have rejected claims that rely upon the Commission’s plenary powers or upon statutes that fail to explicitly authorize intrastate action by the Commission. *TOPUC*, 183 F.3d at 447-48; *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001); *Vonage v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007).

⁸ 47 U.S.C. § 254.

⁹ See *TOPUC*, 183 F.3d at 447-48.

¹⁰ 47 U.S.C. § 251(e).

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Telephone numbers are frequently used for intrastate only services (*e.g.*, voice-mail services and facsimile services). Moreover, the service with which a particular telephone number is associated may be used only for intrastate services despite the capability, and occasional use, of the service for interstate services. With respect to these numbers, therefore, the Commission has no authority to mandate contributions to the federal universal service fund. None of the pending numbers-based contribution methodology proposals, including the Verizon/AT&T *Joint Proposal*, reflect this limitation on the FCC's authority.

Even with respect to numbers associated with services that are both inter- and intra-state in nature, proposals to impose a flat contribution requirement – without regard to the jurisdictional mix of the services associated with the numbers – arguably violate section 152(b). As Verizon Wireless pointed out in its 2003 filings, “any flat rate would represent an impermissible assessment on intrastate revenues” because the proposed mechanism “would improperly assess contributions on all ... phone connections, whether or not they generate interstate revenue.”¹¹ This result is in violation of section 152(b) and the Fifth Circuit's holding in *TOPUC*, because such an assessment would invariably affect intrastate service providers decision on whether and how to provide intrastate services.¹² Failure to address these serious limitations upon the Commission's authority could lead to protracted legal challenges that would interfere with the goals of the universal service program.

Ultimately, the modifications the Commission would have to incorporate into the currently pending numbers-based proposals to address these concerns would eviscerate the justifications articulated in support of those proposals. Specifically, the complexity necessary to reflect the jurisdictional nature of the services associated with individual numbers would eliminate the reduction in complexity cited by those who applaud the Verizon/AT&T *Joint Proposal* and other numbers-based contribution methodologies. At a minimum, carriers would have to track the jurisdictional nature of services associated with specific numbers, and exclude numbers associated with intrastate services from the contribution requirement altogether, which

¹¹ Comments of Verizon Wireless, *Federal State Joint Board on universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration Of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals With Hearing and Speech disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Factor and Fund Size; Number Resource Optimization; Truth-in-Billing and Billing Format*, CC Docket No. 96-45, CC Docket No. 98-171, CC Docket No. 90-571, CC Docket No. 92-237, NSD File No. L-00-72, CC Docket No. 99-200, CC Docket No. 95-116, CC Docket No. 98-170 (filed Apr. 22, 2002) (*Verizon Comments*).

¹² *Verizon Comments* at 7; *TOPUC*, 183 F.3d at 447, n. 101.

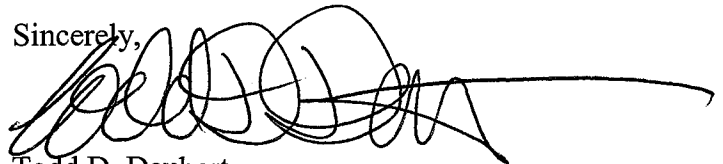
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represents a significant burden for contributors. That numbers can be ported and redirected to services with significantly different jurisdictional characteristics, or even used for services whose jurisdictional characteristics vary significantly over time compounds this burden. Until the Commission publishes details regarding how a numbers-based methodology would operate, parties cannot provide the agency with the type of meaningful feedback needed to determine whether adopting such a methodology is consistent with the limits on Commission authority or would serve the public interest.

Conclusion

For the reasons set forth in this letter, NuVox urges the Commission to seek comment on specific universal service contribution reform proposals before attempting to reform the contribution mechanism.

Sincerely,

A handwritten signature in black ink, appearing to read 'Todd D. Daubert', with a long horizontal line extending to the right.

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